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11 Attorneys for FUNZIO, INC. and FUNZIO USA, INC.

12 UNITED STATES DISTRICT COURT

13 SOUTHERN DISTRICT OF CALIFORNIA

14 GAMETEK LLC,

15 Plaintiff,

16 v.

17 FACEBOOK, INC.; FACEBOOK
OPERATIONS, LLC; FACEBOOK
18 PAYMENTS, INC.; FACEBOOK SERVICES,
INC.; 6WAVES LLC f/k/a LOLAPPS INC.
19 d/b/a 6WAVES LOLAPPS d/b/a SIX
WAVES; 6WAVES TECHNOLOGIES, LLC
20 f/k/a LOLAPPS INC. d/b/a 6WAVES
LOLAPPS d/b/a SIX WAVES; BIG VIKING
21 GAMES INC. f/k/a TALL TREE GAMES;
BUFFALO STUDIOS LLC; CIE GAMES,
22 INC.; CROWDSTAR INTERNATIONAL
LIMITED; CROWDSTAR INC.;
23 CROWDSTAR NETWORK, LLC;
ELECTRONIC ARTS INC. d/b/a EA
24 INTERACTIVE d/b/a PLAYFISH d/b/a
POGO GAMES; FUNZIO, INC.; FUNZIO
25 USA, INC.; ROCKYOU, INC.; SIX WAVES
INC. f/k/a LOLAPPS INC. d/b/a 6WAVES
26 LOLAPPS d/b/a SIX WAVES; THEBROTH
INC.; WOOGA GMBH; ZYNGA INC.; and
27 DIGITAL CHOCOLATE, INC.,

28 Defendants.

CASE NO. 12CV00501-BEN-RBB

**ANSWER, AFFIRMATIVE DEFENSES,
AND COUNTERCLAIMS OF DEFENDANTS
FUNZIO, INC. AND FUNZIO USA, INC. TO
THE FIRST AMENDED COMPLAINT**

DEMAND FOR JURY TRIAL

1
2 Defendant Funzio, Inc. and Funzio USA, Inc. (“Funzio”), by and through its attorneys,
3 answers Plaintiff Gametek LLC’s (“Plaintiff’s”) First Amended Complaint (“Complaint”) and asserts
4 defenses and counterclaims as follows¹:

5 **THE PARTIES**

6 1. Funzio is without knowledge or information sufficient to form a belief as to the truth
7 of the allegations set forth in paragraph 1 of the Complaint and, on that basis, denies each and every
8 allegation of paragraph 1 of the Complaint.

9 2. Funzio is without knowledge or information sufficient to form a belief as to the truth
10 of the allegations set forth in paragraph 2 of the Complaint and, on that basis, denies each and every
11 allegation of paragraph 2 of the Complaint.

12 3. Funzio is without knowledge or information sufficient to form a belief as to the truth
13 of the allegations set forth in paragraph 3 of the Complaint and, on that basis, denies each and every
14 allegation of paragraph 3 of the Complaint.

15 4. Funzio is without knowledge or information sufficient to form a belief as to the truth
16 of the allegations set forth in paragraph 4 of the Complaint and, on that basis, denies each and every
17 allegation of paragraph 4 of the Complaint.

18 5. Funzio is without knowledge or information sufficient to form a belief as to the truth
19 of the allegations set forth in paragraph 5 of the Complaint and, on that basis, denies each and every
20 allegation of paragraph 5 of the Complaint.

21 6. Funzio is without knowledge or information sufficient to form a belief as to the truth
22 of the allegations set forth in paragraph 6 of the Complaint and, on that basis, denies each and every
23 allegation of paragraph 6 of the Complaint.

24
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26
27 ¹ Funzio USA, Inc. no longer exists. It was recently dissolved as part of the acquisition of Funzio,
28 Inc. by GREE International, Inc.

1 7. Funzio is without knowledge or information sufficient to form a belief as to the truth
2 of the allegations set forth in paragraph 7 of the Complaint and, on that basis, denies each and every
3 allegation of paragraph 7 of the Complaint.

4 8. Funzio is without knowledge or information sufficient to form a belief as to the truth
5 of the allegations set forth in paragraph 8 of the Complaint and, on that basis, denies each and every
6 allegation of paragraph 8 of the Complaint.

7 9. Funzio is without knowledge or information sufficient to form a belief as to the truth
8 of the allegations set forth in paragraph 9 of the Complaint and, on that basis, denies each and every
9 allegation of paragraph 9 of the Complaint.

10 10. Funzio is without knowledge or information sufficient to form a belief as to the truth
11 of the allegations set forth in paragraph 10 of the Complaint and, on that basis, denies each and every
12 allegation of paragraph 10 of the Complaint.

13 11. Funzio is without knowledge or information sufficient to form a belief as to the truth
14 of the allegations set forth in paragraph 11 of the Complaint and, on that basis, denies each and every
15 allegation of paragraph 11 of the Complaint.

16 12. Funzio is without knowledge or information sufficient to form a belief as to the truth
17 of the allegations set forth in paragraph 12 of the Complaint and, on that basis, denies each and every
18 allegation of paragraph 12 of the Complaint.

19 13. Funzio is without knowledge or information sufficient to form a belief as to the truth
20 of the allegations set forth in paragraph 13 of the Complaint and, on that basis, denies each and every
21 allegation of paragraph 13 of the Complaint.

22 14. Funzio admits that Funzio, Inc. is a Delaware corporation. Funzio denies the
23 remainder of the allegations in paragraph 14 of the complaint.

24 15. Funzio admits that Funzio USA, Inc. was a Delaware corporation (see Footnote 1
25 above). Funzio denies the remainder of the allegations of paragraph 15 of the complaint.

26 16. Funzio is without knowledge or information sufficient to form a belief as to the truth
27 of the allegations set forth in this paragraph 16 of the Complaint and, on that basis, denies each and
28 every allegation of this paragraph 16 of the Complaint.

1 17. Funzio is without knowledge or information sufficient to form a belief as to the truth
2 of the allegations set forth in paragraph 17 of the Complaint and, on that basis, denies each and every
3 allegation of paragraph 17 of the Complaint.

4 18. Funzio is without knowledge or information sufficient to form a belief as to the truth
5 of the allegations set forth in paragraph 18 of the Complaint and, on that basis, denies each and every
6 allegation of paragraph 18 of the Complaint.

7 19. Funzio is without knowledge or information sufficient to form a belief as to the truth
8 of the allegations set forth in paragraph 19 of the Complaint and, on that basis, denies each and every
9 allegation of paragraph 19 of the Complaint.

10 20. Funzio is without knowledge or information sufficient to form a belief as to the truth
11 of the allegations set forth in paragraph 20 of the Complaint and, on that basis, denies each and every
12 allegation of paragraph 20 of the Complaint.

13 **JURISDICTION AND VENUE**

14 21. Funzio admits that Plaintiff purports to bring this action under Title 35 of the United
15 States Code as a claim for patent infringement. Funzio denies that it has infringed, or is now
16 infringing, any patent, and denies that Plaintiff is entitled to an injunction or any other relief. Funzio
17 admits that subject matter jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 and
18 1338(a). Except as expressly admitted herein, Funzio denies the allegations of paragraph 21 of the
19 complaint.

20 22. Funzio admits only that this Court has personal jurisdiction over Funzio for purposes
21 of this action. Funzio denies that it has infringed, or is now infringing, any patent, and denies that
22 Plaintiff is entitled to an injunction or any other relief. To the extent that the allegations of this
23 paragraph contain legal conclusions, no response is required. Funzio is without knowledge or
24 information sufficient to form a belief as to the truth of allegations in this paragraph as applied to
25 other defendants, and on that basis, denies each and every remaining allegation of paragraph 22 of the
26 Complaint. Except as expressly admitted herein, Funzio denies the allegations of paragraph 22 of the
27 Complaint.

23. Funzio admits venue is proper in this district under 28 U.S.C. §§ 1391(b), 1391(c) and 1400(b) as to Funzio for purposes of this action only, but further states that venue is proper in other districts pursuant to 28 U.S.C. §§ 1391, 1391(c) and 1400(b), and Funzio reserves all rights to move for transfer of venue of this action, severance, or consolidation with other related actions. Funzio denies that it has infringed, or is now infringing, any patent, and denies that Plaintiff is entitled to an injunction or any other relief. Funzio is without knowledge or information sufficient to form a belief as to the truth of allegations in this paragraph related to other defendants and, on that basis, denies each and every remaining allegation of paragraph 23 of the Complaint. Except as expressly admitted herein, Funzio denies the allegations of paragraph 23 of the complaint.

JOINDER

24. Funzio denies each and every allegation of paragraph 24. Funzio maintains that joinder of Funzio in this action is expressly prohibited under 35 U.S.C. § 299.

COUNT I

INFRINGEMENT OF U.S. PATENT NO. 7,076,445

25. Funzio admits that United States Patent No. 7,076,445 (“the ’445 patent”), is entitled “SYSTEM AND METHODS FOR OBTAINING ADVANTAGES AND TRANSACTING THE SAME IN A COMPUTER GAMING ENVIRONMENT.” Funzio further admits that the ’445 patent states, on its face, that it was issued on July 11, 2006. Except as expressly admitted herein, Funzio denies the allegations of paragraph 25 of the Complaint.

26. Funzio is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 26 of the Complaint and, on that basis, denies each and every allegation of paragraph 26 of the Complaint.

27. Funzio is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 27 of the Complaint and, on that basis, denies each and every allegation of paragraph 27 of the Complaint.

28. Funzio denies each and every allegation set forth in paragraph 28 as it relates to Crime City. Funzio is without knowledge or information sufficient to form a belief as to the truth of any

1 other allegations set forth in paragraph 28 of the Complaint and, on that basis, denies each and every
2 additional allegation of paragraph 28 of the Complaint.

3 29. Funzio is without knowledge or information sufficient to form a belief as to the truth
4 of the allegations set forth in paragraph 29 of the Complaint and, on that basis, denies each and every
5 allegation of paragraph 29 of the Complaint.

6 30. Funzio is without knowledge or information sufficient to form a belief as to the truth
7 of the allegations set forth in paragraph 30 of the Complaint and, on that basis, denies each and every
8 allegation of paragraph 30 of the Complaint.

9 31. Funzio is without knowledge or information sufficient to form a belief as to the truth
10 of the allegations set forth in paragraph 31 of the Complaint and, on that basis, denies each and every
11 allegation of paragraph 31 of the Complaint.

12 32. Funzio is without knowledge or information sufficient to form a belief as to the truth
13 of the allegations set forth in paragraph 32 of the Complaint and, on that basis, denies each and every
14 allegation of paragraph 32 of the Complaint.

15 33. Plaintiff's use of the terms "makes", "uses", and "hosts", is ambiguous, and Funzio
16 therefore lacks sufficient knowledge to form a belief as to the truth of the allegations set forth in
17 paragraph 33 of the Complaint. Accordingly and on that basis, Funzio denies each and every
18 allegation of paragraph 33 of the Complaint.

19 34. Funzio is without knowledge or information sufficient to form a belief as to the truth
20 of the allegations set forth in paragraph 34 of the Complaint and, on that basis, denies each and every
21 allegation of paragraph 34 of the Complaint.

22 35. Funzio is without knowledge or information sufficient to form a belief as to the truth
23 of the allegations set forth in paragraph 35 of the Complaint and, on that basis, denies each and every
24 allegation of paragraph 35 of the Complaint.

25 36. Funzio is without knowledge or information sufficient to form a belief as to the truth
26 of the allegations set forth in paragraph 36 of the Complaint and, on that basis, denies each and every
27 allegation of paragraph 36 of the Complaint.

1 37. Funzio is without knowledge or information sufficient to form a belief as to the truth
2 of the allegations set forth in paragraph 37 of the Complaint and, on that basis, denies each and every
3 allegation of paragraph 37 of the Complaint.

4 38. Funzio is without knowledge or information sufficient to form a belief as to the truth
5 of the allegations set forth in paragraph 38 of the Complaint and, on that basis, denies each and every
6 allegation of paragraph 38 of the Complaint.

7 39. Funzio is without knowledge or information sufficient to form a belief as to the truth
8 of the allegations set forth in paragraph 39 of the Complaint and, on that basis, denies each and every
9 allegation of paragraph 39 of the Complaint.

10 40. Funzio is without knowledge or information sufficient to form a belief as to the truth
11 of the allegations set forth in paragraph 40 of the Complaint and, on that basis, denies each and every
12 allegation of paragraph 40 of the Complaint.

13 41. Funzio is without knowledge or information sufficient to form a belief as to the truth
14 of the allegations set forth in paragraph 41 of the Complaint and, on that basis, denies each and every
15 allegation of paragraph 41 of the Complaint.

16 42. Funzio is without knowledge or information sufficient to form a belief as to the truth
17 of the allegations set forth in paragraph 42 of the Complaint and, on that basis, denies each and every
18 allegation of paragraph 42 of the Complaint.

19 43. Funzio is without knowledge or information sufficient to form a belief as to the truth
20 of the allegations set forth in paragraph 43 of the Complaint and, on that basis, denies each and every
21 allegation of paragraph 43 of the Complaint.

22 44. Funzio is without knowledge or information sufficient to form a belief as to the truth
23 of the allegations set forth in paragraph 44 of the Complaint and, on that basis, denies each and every
24 allegation of paragraph 44 of the Complaint.

25 45. Funzio is without knowledge or information sufficient to form a belief as to the truth
26 of the allegations set forth in paragraph 45 of the Complaint and, on that basis, denies each and every
27 allegation of paragraph 45 of the Complaint.

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1 46. Funzio is without knowledge or information sufficient to form a belief as to the truth
2 of the allegations set forth in paragraph 46 of the Complaint and, on that basis, denies each and every
3 allegation of paragraph 46 of the Complaint.

4 47. Funzio is without knowledge or information sufficient to form a belief as to the truth
5 of the allegations set forth in paragraph 47 of the Complaint and, on that basis, denies each and every
6 allegation of paragraph 47 of the Complaint.

7 48. Funzio is without knowledge or information sufficient to form a belief as to the truth
8 of the allegations set forth in paragraph 48 of the Complaint and, on that basis, denies each and every
9 allegation of paragraph 48 of the Complaint.

10 49. Funzio is without knowledge or information sufficient to form a belief as to the truth
11 of the allegations set forth in paragraph 49 of the Complaint and, on that basis, denies each and every
12 allegation of paragraph 49 of the Complaint.

13 50. Funzio is without knowledge or information sufficient to form a belief as to the truth
14 of the allegations set forth in paragraph 50 of the Complaint and, on that basis, denies each and every
15 allegation of paragraph 50 of the Complaint.

16 51. Funzio is without knowledge or information sufficient to form a belief as to the truth
17 of the allegations set forth in paragraph 51 of the Complaint and, on that basis, denies each and every
18 allegation of paragraph 51 of the Complaint.

19 52. Funzio is without knowledge or information sufficient to form a belief as to the truth
20 of the allegations set forth in paragraph 52 of the Complaint and, on that basis, denies each and every
21 allegation of paragraph 52 of the Complaint.

22 53. Funzio is without knowledge or information sufficient to form a belief as to the truth
23 of the allegations set forth in paragraph 53 of the Complaint and, on that basis, denies each and every
24 allegation of paragraph 53 of the Complaint.

25 54. Funzio is without knowledge or information sufficient to form a belief as to the truth
26 of the allegations set forth in paragraph 54 of the Complaint and, on that basis, denies each and every
27 allegation of paragraph 54 of the Complaint.
28

1 55. Funzio is without knowledge or information sufficient to form a belief as to the truth
2 of the allegations set forth in paragraph 55 of the Complaint and, on that basis, denies each and every
3 allegation of paragraph 55 of the Complaint.

4 56. Funzio denies each and every allegation of paragraph 56 of the Complaint.

5 57. Plaintiff's use of the terms "makes", "uses", and "hosts", is ambiguous, and Funzio
6 therefore lacks sufficient knowledge to form a belief as to the truth of the allegations set forth in
7 paragraph 57 of the Complaint. Accordingly and on that basis, Funzio denies each and every
8 allegation of paragraph 57 of the Complaint.

9 58. Funzio is without knowledge or information sufficient to form a belief as to the truth
10 of the allegations set forth in paragraph 58 of the Complaint and, on that basis, denies each and every
11 allegation of paragraph 58 of the Complaint.

12 59. Funzio is without knowledge or information sufficient to form a belief as to the truth
13 of the allegations set forth in paragraph 59 of the Complaint and, on that basis, denies each and every
14 allegation of paragraph 59 of the Complaint.

15 60. Funzio is without knowledge or information sufficient to form a belief as to the truth
16 of the allegations set forth in paragraph 60 of the Complaint and, on that basis, denies each and every
17 allegation of paragraph 60 of the Complaint.

18 61. Funzio is without knowledge or information sufficient to form a belief as to the truth
19 of the allegations set forth in paragraph 61 of the Complaint and, on that basis, denies each and every
20 allegation of paragraph 61 of the Complaint.

21 62. Funzio is without knowledge or information sufficient to form a belief as to the truth
22 of the allegations set forth in paragraph 62 of the Complaint and, on that basis, denies each and every
23 allegation of paragraph 62 of the Complaint.

24 63. Funzio is without knowledge or information sufficient to form a belief as to the truth
25 of the allegations set forth in paragraph 63 of the Complaint and, on that basis, denies each and every
26 allegation of paragraph 63 of the Complaint.

64. Funzio is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 64 of the Complaint and, on that basis, denies each and every allegation of paragraph 64 of the Complaint.

65. Funzio is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 65 of the Complaint and, on that basis, denies each and every allegation of paragraph 65 of the Complaint.

66. Funzio is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 66 of the Complaint and, on that basis, denies each and every allegation of paragraph 66 of the Complaint.

67. Funzio is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 67 of the Complaint and, on that basis, denies each and every allegation of paragraph 67 of the Complaint.

68. Funzio is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 68 of the Complaint and, on that basis, denies each and every allegation of paragraph 68 of the Complaint.

69. Funzio is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 69 of the Complaint and, on that basis, denies each and every allegation of paragraph 69 of the Complaint.

70. In response to Plaintiff's Prayer for Relief, Funzio denies that Plaintiff is entitled to any relief sought in paragraphs 1 through 4 of the Prayer for Relief section.

AFFIRMATIVE DEFENSES

Funzio asserts the following affirmative defenses to the Complaint. Assertion of such a defense is not a concession that Funzio has the burden of proving the matter asserted.

First Affirmative Defense

71. Plaintiff's claims against Funzio should be dismissed under Rule 21 of the Federal Rules of Civil Procedure, and under 35 U.S.C. § 299, for improper joinder of parties.

Second Affirmative Defense

72. Funzio has not infringed, and does not infringe, either literally, by application of the doctrine of equivalents, or jointly, the '445 patent.

Third Affirmative Defense

73. The '445 patent is invalid for failure to meet one or more of the conditions of patentability and/or patent eligibility specified in Title 35 of the United States Code, including, without limitation, sections 101, 102, 103, and/or 112.

Fourth Affirmative Defense

74. Plaintiff is not entitled to any injunction relief because any alleged injury to Plaintiff is not immediate or irreparable, Plaintiff has an adequate remedy at law for any alleged injury, and there is a compelling public interest in allowing Funzio to continue to make, sell, offer to sell, and distribute its offerings.

Fifth Affirmative Defense

75. Plaintiff's claims should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

Sixth Affirmative Defense

76. Plaintiff is barred by the doctrines of prosecution history estoppel and prosecution disclaimer from maintaining that Funzio infringes any claim of the '445 patent.

COUNTERCLAIMS

In addition to its affirmative defenses, Funzio further asserts the following counterclaims against Gametek LLC ("Counterclaim-Defendant").

THE PARTIES

77. Funzio, Inc. is a corporation duly organized and existing under the laws of Delaware, and its principal place of business is located at 55 Second Street, 4th Floor, San Francisco, CA 94105. Funzio USA, Inc. was a corporation duly organized and existing under the laws of Delaware, and its principal place of business was located at 55 Second Street, 4th Floor, San Francisco, CA 94105 (see Footnote 1 above).

1 78. On information and belief, Counterclaim-Defendant is a California limited liability
2 company with its principal place of business at 500 Newport Center Drive, Suite 700, Newport
3 Beach, CA 92660.

4 **JURISDICTION AND VENUE**

5 79. These Counterclaims arise under federal law, and this Court has jurisdiction pursuant
6 to 28 U.S.C. §§ 1331, 1338, 2201, and 2202, and the Patent Laws of the United States, 35 U.S.C. § 1
7 et seq.

8 80. This Court has personal jurisdiction over Counterclaim-Defendant at least because it
9 has submitted to the jurisdiction of this Court.

10 81. Venue is proper under 28 U.S.C. § 1391.

11 82. On or about July 11, 2006, United States Patent No. 7,076,445 (the “’445 patent”)
12 entitled “System and Methods for Obtaining Advantages and Transacting the Same in a Computer
13 Gaming Environment” issued.

14 83. Counterclaim-Defendant asserts that Funzio infringes the ’445 patent. Funzio asserts
15 that the ’445 patent is invalid. Funzio further asserts that it has not infringed and is not infringing the
16 ’445 patent. Pursuant to 28 U.S.C. § 2201(a), an actual and justiciable controversy has arisen and
17 exists between Funzio and Counterclaim-Defendant.

18 84. Funzio is entitled to a judicial determination and declaration that it has not infringed
19 and is not infringing the ’445 patent, and that the ’445 patent is invalid.

20 **FIRST COUNTERCLAIM**

21 **(Declaratory Judgment of Non-Infringement)**

22 85. Paragraphs 77-84 are incorporated by reference as if fully set forth herein.

23 86. On or about February 28, 2012, Counterclaim-Defendant filed its Complaint for Patent
24 Infringement asserting that Funzio infringes the ’445 patent.

25 87. Funzio has not infringed and is not infringing the ’445 patent, either literally, by
26 application of the doctrine of equivalents, or jointly.

27 **SECOND COUNTERCLAIM**

28 **(Declaratory Judgment of Invalidity)**

1 E. That Funzio be awarded under 35 U.S.C. § 285 its attorneys' fees and costs of suit
2 incurred in this litigation, as Plaintiff's conduct as set forth above renders this an exceptional case;
3 and

4 F. For such other relief as the Court deems proper.

5 **DEMAND FOR A JURY TRIAL**

6 Funzio demands a jury trial, pursuant to Fed. R. Civ. P. 38(b), on all issues that may be tried
7 by a jury.

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9
10 Dated: June 4, 2012

11 WAYNE BARSKY
12 JASON LO
13 JORDAN BEKIER
14 CASSANDRA GAEDT
15 GIBSON, DUNN & CRUTCHER LLP

16 By: /s/ Jason Lo
17 Jason Lo

18 Attorney for FUNZIO, INC. and FUNZIO USA, INC.
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CERTIFICATE OF SERVICE

I, the undersigned, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 333 South Grand Avenue, Los Angeles, California 90071.

On June 4, 2012, I caused the following documents to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filings to all known counsel of record:

**ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS OF
DEFENDANTS FUNZIO, INC. AND FUNZIO USA, INC. TO THE FIRST
AMENDED COMPLAINT**

I declare under penalty of perjury under the laws of the United States of America and the State of California that the above is true and correct.

Executed on June 4, 2012, at Los Angeles, California.

/s/ Jason Lo
Jason Lo